No 153

JUN 28 1945

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1945

SIDNEY D. PALMQUIST,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

} PETITION

R. A. HENDRICKS
E. E. HENDRICKS
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Counsel for Petitioner

INDEX TO PETITION

	Page
STATEMENT-INDICTMENT	1
STATUTE INVOLVED	3
CHARGES	3
JURISDICTION	6
ERROR IN OVERRULING PLEA TO JURISDICTION OF THE COURT	7
ERROR IN OVERRULING DEMURRER TO FIRST COUNT OF INDICTMENT	7
MOTION FOR BILL OF PARTICULARS	8
MOTION TO SUPPRESS THE EVIDENCE	9
MOTION FOR DIRECTED VERDICT	9
PRAYER	10

TABLE OF CASES

5 Ct., Aderhold v. United States, 132 Fed. (2) 858	9
10 Ct., Bratton v. United States, 73 Fed. (2d) 795	8
4 Ct., Bray v. United States, 289 Fed. 329	7
5 Ct., Brown v. United States, 47 Fed. (2d) 681	7
6 Ct., Carney v. United States, 79 Fed. (2d) 821 (1)	9
Carroll v. United States, 132 U. S. 175, 69 L. Ed. 543	9

TABLE OF CASES—Continued

	Page
Dunlop v. United States, 165 U. S. 486, 491, 17 S. Ct., 375, 41 L. Ed. 799	8
Durland v. United States, 161 U. S. 306, 16, Sup. Ct. 508, 40 L. Ed. 709	7
5 Ct., Etheredge v. United States, 186 Fed. 434	8
8 Ct., Fontana v. United States, 262 Fed. 283	8
6 Ct., Goulson v. United States, 16 Fed. (2d) 44	7
Hagner v. United States, 285 U. S. 427, 76 L. Ed. 861	8
8 Ct., Hass, et al, v. United States, 93 Fed. (2d) 427	8
5 Ct., Moore v. United States, 128 Fed. (2d) 974	7
People of the State of New York v. Richter's Jewelers, Inc., 291 N. Y. 161, 51 N. E. (2) 690, A. L. R. 150, Page 560 Annotation 6	9
Pettibone, et al, v. United States, 148 U. S. 197, 37 L. Ed. 419	7
Rosen v. United States, 161 U. S. 29-35, 16 S. Ct. 434, 480 40 L. Ed. 606	8
6 Ct., Sparks v. United States, 90 Fed. (2d) 61	9
Taylor v. United States, 286 U. S. 1, 76 L. Ed. 951	9
10 Ct., Travis v. United States, 123 Fed. (2d) 268	7
United States v. Coffman, 50 Fed. Supp. 823	9
Delaware D. Court, United States v. Eisenminger, et al, 16 Fed. (2d) 816	8

TABLE OF CASES—Continued

	Page
5 Ct., United States v. Frisch, 140 Fed. 660	9
United States v. Hess, 124 U. S. 483, 31 L. Ed. 516	8
District Court, S. D. Ga., United States v. Kaplan, 286 Fed. 963	9
District Court, S. D. Florida, United States v. Post, 113 Fed. 852	8
7 Ct., United States v. Wagoner, 143 Fed. (2d) 1	8
5 Ct., Walker v. United States, 125 Fed. (2d) 395	9
8 Ct., Wolpa v. United States, 86 Fed. (2d) 35	7
Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545	8

TEXTBOOKS

Ruling Case Law, Vol. 2, Page 525, Sec. 2	7

STATUTES

18 U. S. C. A. 254	3

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1945

SIDNEY D. PALMQUIST,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION

Your Petitioner, Sidney D. Palmquist, respectfully represents unto the Court as follows:

I

STATEMENT—INDICTMENT

April 5, 1944, petitioner was indicted at Miami, Florida, for offenses under 18 U.S.C.A., Section 254, first count, and under 18 U.S.C.A., Section 121, second count. To the indictment petitioner filed demurrer which was overruled as to first count and sustained as to the second count and defendant was convicted on the first count. First count charged: "Sidney D. Palmquist unlawfully, knowingly and wilfully, did forcibly resist, oppose, impede, intimidate and interfere with an officer and employee of the Internal Revenue while engaged in the performance of his official duties, and did assault him on account of his performance of his official duties, and in

the commission of the aforesaid acts did use a deadly and dangerous weapon, to-wit, a double-barrel shotgun; that is to say, while one Earl P. Carter, who was then and there an officer and employee of the Internal Revenue, to-wit, an Investigator of the Alcohol Tax Unit, and was then and there engaged in the performance of his official duties, to-wit, an investigation into the manufacture and transportation of distilled spirits in violation of the Internal Revenue Laws of the United States and making an effort to apprehend the person or persons violating the laws relating to the manufacture and transportation of distilled spirits, the said defendant, who was then and there armed with a double-barrel shotgun, did attack and assault with said shotgun the said Earl P. Carter, forcing him to abandon the apprehension of the person or persons engaged in the manufacture and transportation of distilled spirits in violation of the laws of the United States, and deterring and preventing the said Earl P. Carter from then and there discharging his official duties as aforesaid, the said defendant well knowing that the said Earl P. Carter was an investigator of the Alcohol Tax Unit, as aforesaid, and that the said Earl P. Carter was then and there engaged in the performance of his official duties as such officer.

"Contrary to the form of the statute in such case made and provided (Section 254, Title 18, U.S.C.A.) and against the peace and dignity of the United States of America."

Petitioner filed plea to jurisdiction of the court, demurrer, motion for bill of particulars, motion to suppress the evidence, motion for directed verdict and motion for

new trial, all overruled. Petitioner was found guilty and sentenced to two years.

II

STATUTE INVOLVED

The Statute upon which the indictment was based is as follows:

18 U.S.C.A., Section 254

> "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in Section 253 of this title while ungaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. (May 18, 1934, c. 299, Sec. 2, 48 Stat. 781.)"

III

CHARGES

Petitioner requested the following charges (Tr. 78-79):

> "The Court charges you that if you believe from the evidence that the Federal officer and

the State officers who engaged in the interception of the defendant, as shown by the evidence, had no search warrant and no warrant of arrest, then each and all of them were acting as private citizens and they had no right to stop the defendant on a public highway for the purpose of a search or seizure or arrest of his person.

"The Court charges you that if you believe from the evidence that Earl P. Carter was a Federal Officer as alleged in the indictment and he attempted to arrest the defendant on a public highway, at night, and you further find from the evidence that the said Carter intercepted the truck which was being driven by the defendant by suddenly driving an automobile operated by said officer or some person by his instructions, swiftly and suddenly in front of the truck operated by defendant and almost forcing his truck off the public road; if you further find that the night was dark, that it was difficult for one person to recognize another and that the officer did not request or demand that the defendant submit to an arrest and you further find from the evidence that the officer had no warrant to search defendant's truck and no warrant to arrest the defendant, then the Court charges you that the officer was acting merely as a private citizen and if the defendant opposed, resisted or impeded any effort on the part of the officer to search the truck of defendant or to arrest him, the defendant would not be guilty as charged in the indictment and your verdict should be one of not guilty.

"The Court charges you that the officers named in the indictment had no legal right to stop the defendant on a public highway unless the defendant was then and there committing a crime in the presence of the officers, known to them, against the laws of the United States, and if you further find that the officers named in the indictment had no search warrant or warrant of arrest and the defendant was not then and there committing a crime against the United States known to the officers, then the defendant had a full right to resist the officers named in the indictment and prevent them from placing defendant in unlawful custody and to prevent the unlawful arrest of the defendant, he had a perfect right to use such force as was at his command and necessary for preventing his arrest, and that force would include the right to use the double-barreled shotgun as alleged in the indictment.

"Mr. Hendricks (Tr. 76):

"In charging upon the question of assault, Your Honor, I would like to have you add, 'That unless in drawing the gun the defendant was justified in so doing.' With the greatest of deference to Your Honor in this respect, I want to urge an exception to the charge wherein the Court stated to the jury that notwithstanding it was the duty of Mr. Carter to get a warrant, a search warrant or a warrant of arrest, if at the time of this incident he knew or had reasonable grounds to believe that a crime against the Federal Government was being then and there com-

mitted, he was authorized in attempting to make the arrest. My exception to that, may it please Your Honor, is that it is not authorized by the evidence."

The Court charged the jury as follows: (Tr. 73):

"From the evidence in the case it is clear that Carter did not know that the defendant was committing an offense against the United States government. The evidence does not warrant a finding that the defendant was actually violating the revenue laws of the United States at that time, and it does not warrant a finding that there was contraband in the truck, but the question still remains for your consideration as to whether he, Carter, had reasonable grounds to believe that Palmquist was then and there at that time and place committing an offense against the laws of the United States."

This charge is so conflicting, contradictory and confusing until it resulted in misleading the jury causing them to return an erroneous verdict of guilty.

IV

JURISDICTION

The writ is applied for under the provision of Rule 11, Title 18, U.S. Code 1940 Ed., page 1622—Rules 38 and 39 of the Supreme Court. The statutes involved are set forth herein (infra).

The date of judgment of Circuit Court of Appeals was April 14, 1945, and the judgment on the motion for re-hearing was May 22, 1945.

V

ERROR IN OVERRULING PLEA TO JURISDICTION OF THE COURT

The Court should have sustained the plea to the jurisdiction because the ruling is contrary to the case of **Pettibone, et al, v. United States,** 148 U.S. 197, 37 L. Ed. 419.

Brown v. United States, 5 Ct., 47 Fed. (2d) 681.

Ruling Case Law, Vol. 2, Page 525, Sec. 2.

4 Ct., **Bray v. United States,** 289 Fed. 329.

ERROR IN OVERRULING DEMURRER TO FIRST COUNT OF INDICTMENT

The demurrer should have been sustained to the first count of the indictment.

Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

5 Ct., **Moore v. United States,** 128 Fed. (2d) 974.

10 Ct., **Travis v. United States,** 123 Fed. (2d) 268.

8 Ct. **Wolpa v. United States,** 86 Fed. (2d) 35.

6 Ct., **Goulson v. United States,** 16 Fed. (2d) 44.

Delaware D. Court, **United States v. Eisenminger, et al,** 16 Fed. (2) 816.

10 Ct., **Bratton v. United States,** 73 Fed. (2d) 795.

7 Ct., **United States v. Wagoner,** 143 Fed. (2d) 1.

5 Ct., **Etheredge v. United States,** 186 Fed. 434.

District Court, S. D. Florida, **United States v. Post,** 113 Fed. 852.

8 Ct., **Fontana v. United States,** 262 Fed. 283.

8 Ct., **Hass, et al v. United States,** 93 Fed. (2d) 427.

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516.

Hagner v. United States, 285 U. S. 427, 76 L. Ed. 861:

> "It, of course, is not the intent of Harmless Error statutes to dispense with the rule which requires that the essential elements of an offense must be alleged."

MOTION FOR BILL OF PARTICULARS

There is a conflict in the decisions as to when a defendant is entitled to bill of particulars.

Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545.

Dunlop v. United States, 165 U. S. 486, 491, 17 S. Ct., 375, 41 L. Ed. 799.

Rosen v. United States, 161 U. S. 29-35, 16 S. Ct. 434, 480, 40 L. Ed. 606.

MOTION TO SUPPRESS THE EVIDENCE

There is a conflict of the decisions of the Fifth Circuit and the decisions of other courts.

5 Ct., **Walker v. United States,** 125 Fed. (2d) 395.

5 Ct., **United States v. Frisch,** 140 Fed. 660.

United States v. Coffman, 50 Fed. Supp. 823.

Peoples of the State of New York v. Richter's Jewelers, Inc., 291 N. Y. 161, 51 N. E. (2) 690, A. L. R. 150, Page 560, Annotation 6, unlawful search of property of third party, page 577.

5 Ct., **Aderhold v. United States,** 132 Fed. (2) 858.

6 Ct., **Sparks v. United States,** 90 Fed. (2d) 61.

6 Ct., **Carney v. United States,** 79 Fed. (2d) 821 (1).

Carroll v. United States, 132 U. S. 175, 69 L. Ed., 543. Text of Opinion, 551.

Taylor v. United States, 286 U. S. 1, 76 L. Ed. 951.

District Court, S. D. Ga., **United States v. Kaplan,** 286 Fed. 963.

MOTION FOR DIRECTED VERDICT (TR. 50-71)

If it was reasonably practicable for the law enforcement officers to obtain a search warrant or a warrant for the arrest of petitioner before they intercepted him on a public highway when petitioner was committing no offense in the presence of the officers, then petitioner

was entitled to a directed verdict and the ruling of the District Court and Circuit Court is in conflict in this case with former decisions of the Fifth Circuit and of **Carroll v. United States**, supra.

PRAYER

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of record of all proceedings of the said Circuit Court of Appeals in said cause therein entitled **Sidney D. Palmquist, Appellant, vs. United States of America, Appellee,** No. 11,115, to the end that the said case may be reviewed and determined by this Court as provided in Judicial Code, Section 240, as amended by the Act of February 13, 1925, and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the said Act, and that the said decree of the Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

R. A. HENDRICKS
B. E. HENDRICKS
BART. A. RILEY
Counsel for Petitioner

UNITED STATES OF AMERICA
Southern District of Florida,
Miami, Florida

R. A. HENDRICKS, being first duly sworn, deposes and says that he is counsel for Sidney D. Palmquist, the petitioner named in the foregoing petition; that he prepared the foregoing petition, and that the matters and things herein set forth are true as he verily believes.

R. A. HENDRICKS

SWORN to and subscribed before me this 8th day of June, A.D. 1945.

ELIZABETH HEDRICK
Notary Public State
of Florida at Large

My commission expires:
September 22, 1947

(Note: Since the legal propositions upon which the petitioner relies have been discussed sufficiently in the foregoing petition, petitioner refrains, in the interest of brevity, from appending a brief.)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	7

CITATIONS

Cases:

Carroll v. *United States*, 267 U. S. 132 5

Husty v. *United States*, 282 U. S. 694 5

Jones v. *United States*, 131 F. 2d 539 5

Thompson v. *United States*, 44 F. 2d 165 5

Turner v. *Camp*, 123 F. 2d 840 5

Statute:

Act of May 18, 1934, c. 299, 48 Stat. 780, 18 U. S. C. 253–254 2

664784—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 153

SIDNEY D. PALMQUIST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals affirming petitioner's conviction (R. 85–88) and its opinion denying his petition for rehearing (R. 103–104) are reported at 149 F. 2d 352. The opinion of the district court denying petitioner's motion for a new trial appears at pages 11–12 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered April 14, 1945 (R. 88), and a petition for rehearing (R. 89–102) was denied May 22, 1945 (R. 104). The petition for a writ of cer-

tiorari was filed June 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The principal question presented is whether the evidence is sufficient to support petitioner's conviction for resisting a federal officer in the performance of his official duties.

STATUTE INVOLVED

The Act of May 18, 1934, c. 299, 48 Stat. 780, 18 U. S. C. 253–254, provides in pertinent part:

> Sec. 2. Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person * * * while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted on the first count of a three-count indictment returned against him in the United States District Court for the Southern

District of Florida charging that, in violation of 18 U. S. C. 254, he unlawfully, knowingly, and wilfully resisted an officer of the Internal Revenue engaged in the performance of his official duties and assaulted such officer with a shotgun (R. 2–3, 10). Petitioner was sentenced to imprisonment for two years (R. 14), and on appeal the judgment was affirmed (R. 88).

The evidence for the Government may be summarized as follows:

Carter, an agent of the Alcohol Tax Unit of the Internal Revenue Bureau, received information that petitioner was operating a still near a farm known as the Bennett place, and that liquor would be transported from there during the night of October 22, 1943 (R. 23). Carter and two state officers, Morgan and Fox, drove to the vicinity of the Bennett place at about 6:30 p. m. on the night of October 22. They noticed a pick-up truck being driven toward the Bennett place which bore the license number that had been given to them. They followed the truck for a short while and then parked their car on the side of the highway. (R. 18, 23, 37–38.) Carter and Fox remained in the car and Morgan went on toward the house. The arrangement was that, if Morgan saw anything loaded on to the truck, he was to signal Carter and Fox by flashlight. (R. 18, 38.) About twenty minutes later, Carter saw a light at Bennett's place and then the headlights of a car

flashed on and off. Fox thought that Morgan had stopped the truck and was signaling to them. Carter and Fox started their car. As they were going down the road, the truck came toward them and Carter crowded it to the edge of the road. He called out, "Federal officers, hold everything!" The driver of the truck attempted to get it away but could not. Petitioner jumped out and turned a double-barreled shotgun on Carter and Fox. Carter again stated that he was a federal officer. Petitioner replied that he did not care who they were. (R. 19, 20, 40, 41, 46; see also R. 68.) By that time Morgan came out from the bushes near the road behind the truck and identified himself. Petitioner covered Morgan with his gun and ordered the three officers back to the government car. The officers entered the car and drove away. (R. 19–20, 40–41.)

In submitting the case to the jury, the judge charged that Carter had no legal right to arrest petitioner unless he knew or had reasonable grounds to believe that petitioner was then and there committing an offense against the United States; that unless they found such knowledge or reasonable grounds, petitioner had a full right to resist the officers (R. 71–72); that it was clear from the evidence that Carter had no knowledge of an offense against the United States, but that it was for the jury to determine whether he had reasonable grounds to believe that an offense was

being committed (R. 73). He also charged that, in order to convict, the jury must find that petitioner knew that Carter was an officer of the United States (R. 72, 73).

ARGUMENT

1. Petitioner contends (Pet. 9–10) that the evidence fails to establish that the federal officer was acting legally in stopping petitioner's truck and, hence, that it is insufficient to support the verdict. However, the trial judge specifically instructed the jury that before they could convict they must find that Carter had reasonable grounds to believe that petitioner was committing an offense, i. e., that a search of the truck under the circumstances shown would have been legal.[1] The evidence as to the officers' prior information concerning petitioner's activities and their arrangement for flashlight signals (see pp. 3–4, *supra*) clearly warranted the jury in concluding that the officers had reasonable grounds for stopping petitioner's truck. Cf. *Husty* v. *United States*, 282 U. S. 694, 700–702; *Carroll* v. *United States*, 267 U. S. 132, 160–162; *Jones* v. *United States*, 131 F. 2d 539 (C. C. A. 10); *Turner* v. *Camp*, 123 F. 2d 840 (C. C. A. 5); *Thompson* v. *United States*, 44 F. 2d 165 (C. C. A. 5).

[1] In view of this charge the case does not present the question as to whether an officer who exceeds his authority is nevertheless engaged in the performance of his official duties within the purview of 18 U. S. C. 254.

Petitioner's remaining contentions are frivolous:

a. His challenge to the jurisdiction of the district court on the ground that the indictment charged merely a state offense (R. 3–4; see Pet. 7) was properly overruled. There can be no question that interference with a federal officer in the performance of federal duties is a federal crime.

b. His demurrer to the indictment on the ground that it was too vague and indefinite to state an offense (R. 7–8; see Pet. 7–8) is refuted by a mere reading of the indictment (R. 2–3), which specifies the time, place, and circumstances of the crime in considerable detail. By the same token, the district court did not abuse its discretion in denying petitioner's motion for a bill of particulars (R. 5–7; see Pet. 8).

c. Petitioner's motion to suppress evidence (R. 4–5; see Pet. 9) was without merit. As the court below pointed out (R. 87), no evidence of the crime with which petitioner was charged was obtained as the result of a search, and in fact the officers never had the opportunity to make a search. The issue in the case was simply, as the court below concluded, "whether or not the defendant knowingly resisted [a federal officer] in the attempted performance of [his] duty. This was an issue of fact which the jury resolved against the defendant, with substantial evidence to support its verdict" (R. 88).

CONCLUSION

The decision below is correct and it presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
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Attorneys.

SEPTEMBER 1945.

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